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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 167

W. C. TUCKER, PETITIONER

v.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. Its judgment and findings will be found at page 74 of the record. The opinion of the Circuit Court of Appeals (R. 83) is reported in 15 F. (2d) 356.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 1, 1926. (R. 87.) A petition for rehearing was denied January 15, 1927. (R. 89.) A petition for certiorari was filed January 24, 1927, and was

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allowed March 7, 1927. (R. 90.) Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The ultimate question is whether, in a suit by a taxpayer against a collector of internal revenue to recover a tax claimed to have been illegally assessed, the collector and his counsel may waive compliance with the statutory requirement that no suit shall be maintained in any court for the recovery of any internal-revenue tax until a claim for refund, stating the ground of the claim, has been presented to the Commissioner of Internal Revenue.

The question also arises whether Section 3226 of the Revised Statutes and the regulations adopted thereunder should be construed to prevent a recovery in such action on any ground not set forth in the claim for refund previously filed with the Commissioner of Internal Revenue.

Another question is whether on certiorari this Court will, ordinarily, consider any question not raised in the petition for certiorari or supporting brief and not considered by the Circuit Court of Appeals.

STATUTES INVOLVED

At the time this suit was filed Section 3226, R. S., as amended by Section 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343; U. S. C., Title 26, Sec. 156), read as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

At the time the claim for refund was filed (November 2, 1923) Section 3226 was as above set forth except for the words "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest

or duress," which were added by the amendment of 1924.

Article 1036 of Treasury Regulations No. 45 (1920 edition) provides:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 46 (revised). In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim shall be clearly set forth under oath.

Subsequently Form 843 took the place of Form 46. That form (R. 6), which was part of the regulation, required the claimant to state the grounds for his claim.

STATEMENT

This was a suit by the petitioner against a collector of internal revenue to recover an income tax for the year 1920 in the sum of $8,610.84, claimed to have been illegally assessed. A jury was waived and the case was tried to court, which made special findings of fact and ordered judgment for the defendant. The District Court decided the case on the merits, holding that no excessive tax had been collected. No point was made by the collector in the District Court respecting the sufficiency of the claim for refund which had been filed with the collector, nor was the claim there asserted that recovery could not be had on a ground not set up in the claim for refund. This point was raised for

the first time by the Collector in the Circuit Court of Appeals, which sustained it and did not pass on the merits.

The special findings of the District Court (R. 74–79) show that petitioner in 1920 was the owner of 150 shares (half) of the outstanding capital stock of the Osage Mercantile Company, a corporation, and that the company was liquidated in that year by distribution of its assets, and the question was as to the gain derived by the petitioner from such liquidation. He had owned the stock at and prior to March 1, 1913. The assets of the corporation were not sold at liquidation but were distributed in kind to the petitioner and his brother, who owned all the stock and who assumed all of the corporation's liabilities, and formed a partnership to take the assets and go on with the business. Between March 1, 1913, and the date of liquidation in 1920 the corporation had made a distribution of real estate and money, and the question was whether these distributions should be treated as a return of capital deductible from the cost or March 1, 1913, value in computing the gain derived from liquidation in 1920. One of these distributions occurred May 13, 1913, when the corporation conveyed certain real estate to the Mercantile Real Estate Company, a corporation organized for that purpose and the stock of which was taken by the stockholders of the Osage Mercantile Company pro rata. The other distribution was a dividend in money,

May 14, 1913, out of profits acquired prior to March 1, 1913.

Before the trial closed it appeared and was conceded by both sides (R. 64, petitioner's brief, p. 19) and found by the court that the March 1, 1913, value of the stock was $356.88 per share. The value of the assets of the corporation at date of liquidation in 1920 was likewise found and conceded to be $319.42 per share. The value of the distributions made between March 1, 1913, and date of liquidation was also found and conceded to be $153.15 per share. This left only in dispute the question whether the distributions referred to should be treated as returns of capital, and therefore as a return of part of the cost or March 1, 1913, value, so that in determining the gain realized from the liquidation in 1920 there should be deducted from the March 1, 1913, value the amount of the distributions and only the balance should be deducted from the amount realized in 1913 in determining the profit from the liquidation.

This statement is subject to the qualification that the value as of March 1, 1913, was arrived at without including good will, and the petitioner did complain of that, but since good will was also excluded in fixing the value of the assets at liquidation, and whatever good will existed was distributed in 1920, the point is of no real substance. Again, there was a dispute as to the value of the real estate, but since the same value was placed on it March 1, 1913,

and at the date of its distribution, May 14, 1913, and it was not claimed that any change in value occurred between those dates, that dispute seems of no consequence. In any event, we are safe in stating that on the special findings of the trial court no recovery could be had by the petitioner unless on the ground that as a matter of law the distributions of real estate and dividends should not have been treated as returns of cost or March 1, 1913, capital value.

In his petition in the District Court petitioner alleged (R. 4) that he had previously filed with the Commissioner of Internal Revenue a claim for refund "in due form of law and upon the form prescribed therefor by said Commissioner." Copy of the claim for refund (marked "Exhibit C") was made a part of the petition. (R. 6.)

The collector interposed a general denial. (R. 6.) The claim for refund was offered in evidence by the petitioner. (R. 51.) It stated generally, as to ground for the claim, that the taxpayer actually had a loss instead of a profit on the liquidation—

> as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT: PA: FR–JRC–708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim.

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The document referred to in the claim, and made part of it by reference (R. 54), gave as a ground of the claim for refund the following reasons:

> The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier whch the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.

It will be observed that in the claim for refund it was asserted that error had been made in determining the March 1, 1913, value of the stock and that error had been made in determining the net value of the assets distributed in kind at liquidation in 1920, but nothing was said respecting the matter of deduction, from March 1st, 1913, value of the stock, of the distributions which had taken place between March 1, 1913, and the date of the liquidation, and, on the contrary, the claim for refund expressly accepted the decision of the Bureau of Internal Revenue in all but the two respects stated. (R. 54–55.)

In his petition in the District Court (R. 4) it was alleged as a ground for recovery, first, that the Commissioner took $356.86 per share as the fair value on March 1, 1913, when the true value was $500, and, second, that the Commissioner made a mistake in determining the net value of the assets at dissolution. These grounds for recovery stated in the petition were the same as, or were broad enough to include, the grounds for recovery set up in the claim for refund, but both of them were abandoned during the trial and an entirely different ground assigned for recovery. The attack on the valuation placed on the stock as of March 1, 1913, was abandoned (R. 64; brief for petitioner, p. 19), as was the claim of error in determining the value of the assets distributed in kind at the liquidation in 1920 (R. 64); and as the case was finally submitted to the trial court the only question was whether the distributions made between March 1, 1913, and the date of liquidation were income to the taxpayer, or whether they were returns of the cost or capital value of the stock as of March 1, 1913, and which should be charged to him as such in determining the gain derived from the liquidation. This ground for recovery was not set up in the claim for refund filed with the Commissioner, nor in the petition in the United States District Court. It was, however, litigated by consent. In the opening statements of counsel for the collector and for the taxpayer (R. 7–11), which clearly state the questions to be tried, there is no suggestion that any point was involved

as to the sufficiency of the claim for refund or that no recovery could be had on the ground that the distributions had been improperly treated as return of capital value because that ground was not set up in the claim for refund. The record in the District Court does not show that this question was mentioned.

Towards the close of the trial (R. 64) a stipulation was made in open court stating what the question was for decision, and which was, in effect, a stipulation that if the collector was wrong in the deduction of the distributions from the March 1, 1913, value, the taxpayer was entitled to a judgment for a specified amount, $6,642.13.

In its findings the trial court made no reference to the form of the claim for refund, finding, generally, that a claim for refund was filed.

The Circuit Court of Appeals, on writ of error sued out by the petitioner, did not pass on the merits of the case or the correctness of the computation of the tax, but held that the taxpayer could not recover because the claim for refund did not state the grounds for recovery set up in the petition in the District Court. Whether this point had been waived by the collector in the court below, or whether he had power to waive it, was not considered by the Circuit Court of Appeals.

Instead of remanding with instructions to dismiss without prejudice to a new claim for refund and another suit, it affirmed the judgment on the merits.

The petition for certiorari filed in this Court specified as the grounds for issuing the writ and as the errors complained of in the action in the Circuit Court of Appeals (Petition for certiorari, pp. 19–27) that the Circuit Court of Appeals had erred in holding that the grounds for recovery relied on in the suit had not been specified in the claim for refund, in holding that the statute and regulations should be construed to require the grounds to be set forth, and in holding that the failure to set forth in the claim for refund the grounds for refund relied on in the suit was a defect which the Circuit Court of Appeals could take notice of, although not raised in the District Court. The same grounds for issuing the writ were presented in the supporting brief (pp. 29–49). The petition for certiorari and supporting brief did not deal with the merits.

SUMMARY OF ARGUMENT

I. On certiorari to a United States Circuit Court of Appeals this Court should ordinarily not consider any question not raised in the petition for certiorari or supporting brief and not considered by the Circuit Court of Appeals, and there is nothing in this case to justify the Court in exercising any discretion it may have to consider questions not raised in the petition for certiorari or supporting brief and not considered or decided by the Circuit Court of Appeals.

II. Under Section 3226 of the Revised Statutes and the regulations adopted thereunder no recovery

should be allowed in a suit to recover taxes claimed to have been illegally assessed, on any ground not stated in the claim for refund filed with the Commissioner of Internal Revenue. The statute provides that no such suit shall be maintained unless a claim is filed in accordance with the regulations established by the Secretary of the Treasury. The regulations prescribe that the claim shall specify the grounds or reasons on which it is based. The regulation has the force of law. Compliance with the statute and regulations is a condition precedent to recovery against either the United States or a collector of internal revenue. The purpose of the statute is to prevent litigation against the United States or a collector until the Commissioner of Internal Revenue has had opportunity to examine the alleged grounds for recovery. The burden is on the taxpayer to plead and prove the fact that the ground of recovery relied on in the statute was stated in the claim for refund.

III. In the present case it appears from the record that the ground for recovery finally relied on was not mentioned or suggested in the claim for refund. It appears also that this defect in the claim for refund was not relied on by the collector at the trial in the District Court, but he, by stipulation, in effect eliminated the question from the case by stipulating that the only question for decision related to the manner of computation. This amounted to a waiver of the point if it was competent for the collector and his counsel to waive

it. It has been held that statutes of limitation imposed as conditions to the consent of the United States to be sued are jurisdictional and can not be waived; and something may be said on the proposition that in a suit against the United States or the Collector of Internal Revenue the condition imposed by this statute may not be waived, but it is far from clear that, in respect of the form of a claim for refund which is prescribed by regulation of the Treasury Department, public policy denies authority to the collector to waive compliance with the regulation.

ARGUMENT

I

MATTERS DEALT WITH BELOW BY THE DISTRICT COURT RELATING TO THE MERITS OF THE CASE AND THE CORRECT AMOUNT OF THE TAX ARE NOT PROPERLY BEFORE THIS COURT FOR DECISION

The petitioner devotes a large part of his brief to consideration of the decision of the District Court and of the proper method of computing the tax in question. These matters are not properly before this Court for consideration. The specification of errors assigned in the petition for certiorari and supporting brief and the grounds for the issuing of the writ urged upon this Court in those documents are confined to the points dealt with by the Circuit Court of Appeals and to the questions whether the claim for refund was in the form prescribed by law and regulations, and

whether the Circuit Court of Appeals had a right to deal with that question which had not been raised in the trial court.

In dealing with writs of certiorari appellate courts have been strict in confining themselves to the points or alleged errors set forth in the petition for certiorari. Some courts have gone to the extent of holding that on certiorari the appellate court has no power to deal with any point not so specified. See Encyc. Pleading and Practice, Vol. 4, p. 293, and cases cited.

In the present case the petition for certiorari could not properly specify any errors relating to the merits of the case, because the Circuit Court of Appeals did not pass on the merits.

Ordinarily this Court will not consider questions not dealt with by the Circuit Court of Appeals. Conceding that this Court, in its discretion, may consider questions not dealt with by the Circuit Court of Appeals and not mentioned in the petition for certiorari and supporting brief, this is not a proper case for the exercise of such discretion. The questions relating to the merits of this case and the computation of this tax are of no general importance and would not justify the consideration of this Court in any event. If the Circuit Court of Appeals was not right in the ground for its decision, the merits of the case should not be considered here, but the case should be remanded to the Circuit Court of Appeals for decision.

II

IN A SUIT TO RECOVER TAXES ALLEGED TO HAVE BEEN ILLEGALLY ASSESSED NO RECOVERY SHOULD ORDINARILY BE ALLOWED ON ANY GROUND WHICH HAS NOT BEEN ASSERTED IN THE CLAIM FOR REFUND FILED WITH THE COMMISSIONER OF INTERNAL REVENUE

The statute prescribes that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously collected

> until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.

The statute requires that a claim for refund shall be filed, but does not specify its form or contents, and leaves it to the Secretary of the Treasury to fix them by regulation. The regulation prescribed that the claim for refund "shall be made on Form 46," and also that all facts relied on in support of the claim must be clearly set forth under oath. Form 46, and a later form, 843 (which was used in this case, R. 6), provide on their face for a statement of the grounds or reasons on which the claim for refund is based. The form is a part of the regulation. The regulation has the force of law. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. These provisions originated in Section 19 of the In-

ternal Revenue Act approved July 13, 1866 (C. 184, 14 Stat. 98, 152), about which this Court said in *Nichols* v. *United States,* 7 Wall. 122, 130:

> To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system,* which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.
>
> And an equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment, or collection of taxes, by suit: but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the Commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal. (14 Stat. at Large, 111, amendment to Sec. 44; Sec. 19, on p. 152.) Thus it will be seen that the

> person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to the Commissioner, and at all events, he is barred from bringing a suit, unless he does it within a year from the time the Commissioner is notified of his appeal. The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

See *Cheatham* v. *United States,* 92 U. S. 85; *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Rock Island, Ark. & La. R. R. Co.* v. *United States,* 254 U. S. 141; *Hicks* v. *James,* 48 Fed. 542, 110 U. S. 272; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Girard Trust Co.* v. *United States,* 270 U. S. 163. Some of these cases dealt with protests and not claims for refund, but the principle is applicable to both. The statute applies to suits against collectors as well as to suits against the United States. (See *Kings County Savings Inst.* v. *Blair, supra; Arnson* v. *Murphy,*

109 U. S. 238; *Sage* v. *United States,* 250 U. S. 33.) To hold that recovery may be had in court on grounds not stated but, as in this case, waived in the claim for refund, would be to nullify the statute and regulation and defeat their purpose.

In the present case the Circuit Court of Appeals was in error in saying that the grounds for recovery set up in the petition in the District Court differed from those set up in the claim for refund. The grounds alleged in the petition in the District Court were substantially the same as those set up in the claim for refund, relating, as they did, to the value of the stock as of March 1, 1913, and to the net value of the assets distributed in kind at the date of liquidation in 1920, but the taxpayer abandoned the grounds set up in his petition and in his claim for refund, and the only ground for recovery really relied on at the close of the trial was that the distributions made between March 1, 1913, and the date of liquidation were improperly deducted from the March 1, 1913, value in the computation of the gain. No such ground was asserted in his claim for refund or in his petition in the United States District Court. Although the Circuit Court of Appeals was mistaken in saying that the petition in the District Court did not assign any ground for recovery stated in the claim for refund, it was right in considering the question in the case, because the ground for recovery actually relied on in the District Court, although not

pleaded, was not suggested but had been waived in the claim for refund.

III

WAS THE DEFECT IN THE CLAIM FOR REFUND WAIVED IN THE DISTRICT COURT?

The record shows that the point that the ground relied on for recovery in the District Court had not been specified in the claim for refund was not raised or mentioned in the District Court. The plaintiff had the burden of establishing compliance with this condition precedent and accepted the burden in his petition and proof. His proof showed affirmatively that he had not raised in his claim for refund the point relied on in court, but no advantage was taken of that fact by any action in the District Court by the collector. It was not the duty of the collector to plead and prove noncompliance with the statute and regulation as a matter of defense. His answer denied that the claim for refund had been filed in due form of law. If he had merely remained silent in the District Court, since the record shows affirmatively that the condition precedent had not been complied with, and since the findings fail to show compliance with this condition precedent, the point might have been open to him in the Circuit Court of Appeals, but the record affirmatively shows that the question was removed from the case so far as the collector had power to remove it.

The opening statement of counsel in defining the questions for decision did not mention the point.

Near the close of the case, in order to simplify the issues, a stipulation or admission was made in open court by the collector. (R. 64.) As we construe this stipulation it was to the effect that the March 1, 1913, value of the stock was agreed to; that the net value of the assets liquidated was agreed to; that the value of the intermediate distribution was agreed to, and that the only question left for decision was whether the intermediate distributions should be deducted from the March 1, 1913, value, and the stipulation is to the effect that if the Government was wrong in making this deduction and in its method of computing the March 1, 1913, value, by deducting the intermediate distributions, the plaintiff was entitled to judgment for $6,642.13. It must be admitted that counsel for the collector did not intend to raise the point and intended to make a stipulation to the effect that only the question of computation was left for decision. Unless there is a rule of public policy which forbade the collector from making such a concession we do not see how the point was left in the case.

In dealing with conditions in the nature of statutes of limitation attached by Congress to its consent to suits against the United States, this Court has said that the conditions are jurisdictional and that no officer has authority to waive them.

In *Finn* v. *United States,* 123 U. S. 227, on the question of such a limitation in an action against the United States in the Court of Claims, it was said (p. 232):

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

In *Cheatham* v. *United States,* 92 U. S. 85, 88, 89, the Court said:

> It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues. * * * In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must

> be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax.

And in *Rock Island, Ark. & La. R. R. Co.* v. *United States,* 254 U. S. 141, it was said (p. 143):

> Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. * * * At all events the words are there in the statute and the regulations, and the court is of opinion that they mark the conditions of the claimant's right.

And various limitations made by the Interstate Commerce Act on the presentation of claims against carriers have been held to be jurisdictional. *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642.

While *Finn* v. *United States, supra,* and other similar cases deal with conditions attached by the sovereign to its consent to be sued, and the present case is not a suit against the United States, but one at common law against the collector, Congress has, for obvious reasons, regulated and modified by statute the common-law liability of collectors.

In *Kings County Savings Inst.* v. *Blair, supra,* the action was against the administrator of the estate of the deceased collector. This Court said (116 U. S. 205):

> We regard the presentation of the claims to the commissioner of internal revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States,* 92 U. S. 85; *Railroad Company* v. *United States,* 101 U. S. 543; *Arnson* v. *Murphy,* 109 U. S. 238.

In *Arnson* v. *Murphy,* 109 U. S. 238, where the action was against the collector of customs, the Court said (p. 243):

> From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout,* 10 Pet. 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive.

And again, in *Sage* v. *United States,* 250 U. S. 33, it was said (p. 36):

> It is true that the statutes modify the common law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit. Rev. St. Sec. 3226.

In *Collector* v. *Hubbard*, 12 Wall. 1, in dealing with a suit against the collector to recover taxes claimed to have been illegally assessed, in construing the Act of July 13, 1866, which enacted that no suit could be maintained in any court to recover a tax illegally assessed until the taxpayer had appealed to the Commissioner of Internal Revenue, this Court said (page 14):

> Suits for such causes of action are absolutely prohibited until the taxpayer shall appeal to the Commissioner of Internal Revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken.

In none of these cases, dealing with the statutory requirement that an appeal must be filed or a claim filed with the Commissioner of Internal Revenue before a suit to recover the tax is maintained, has this Court said or held, as it did in connection with statutes of limitation on suits against the United States, that noncompliance may not be waived.

In deference to the Circuit Court of Appeals and the views of the Bureau of Internal Revenue, the question is submitted for decision, but we are not prepared to insist that the rule which has been applied to limitations prescribed in connection with the sovereign's consent to be sued is applicable to a condition precedent such as that here involved. In the present case the defect in the claim for refund was in form and contents. They were prescribed not by statute but by regulation of the Treasury Department. If no officer has authority to waive the statutory requirement that a claim for refund shall be filed, it may be that public policy requires that the condition precedent as to contents of the claim prescribed by regulations of the Treasury Department is one which counsel for the United States or for a collector of internal revenue has not authority to waive, but this seems doubtful. In the present case, it may have been to the interest of the United States to waive it. To assert it might have resulted in the dismissal of the suit, to be followed by a new claim for refund and another suit. If the Commissioner of Internal Revenue had not been deceived or misled as to the ground for the claim for refund it might have been considered advisable to have the case disposed of on the merits without raising a technical question which would result in further legal proceedings without any gain to the collector or the Government.

CONCLUSION

Unfortunately, not until this case has reached this Court has it been sifted down to the ultimate question. It seems reasonably clear that the Circuit Court of Appeals was right in holding that ordinarily no recovery may be had in a suit to recover a tax illegally assessed unless the ground for recovery relied on in the suit is stated in the claim for refund. It is likely that the Circuit Court of Appeals may consider such a point where it appears from the face of the record that on the plaintiff's own case in a matter respecting which the burden rested on him he had failed to comply with the statutory condition precedent. The difficulty with this case rests in the fact that the point seems to have been stipulated out of it in the trial court, a situation which does not appear to have been brought to the attention of the learned judges of the Circuit Court of Appeals.

If this Court concludes that the point is one the collector of internal revenue had no authority to waive, the case should be remanded for dismissal without prejudice. Even if the Circuit Court of Appeals was right in holding that the condition precedent had not been complied with, and that the point was still in the case, instead of affirming the judgment on the merits, it should have remanded

for dismissal without prejudice to the filing of another claim for refund and a subsequent suit.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

F. W. DEWART,
Special Attorney,
Bureau of Internal Revenue.

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